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IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION and JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants,

v.

THE STATE OF MISSISSIPPI, *et al.*,
Appellees.

On Appeal From the United States District Court for the Southern District of Mississippi

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BRIEF OF AMICUS CURIAE FLORIDA POWER & LIGHT COMPANY IN SUPPORT OF APPELLEES

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BRIEF OF AMICUS CURIAE FLORIDA POWER & LIGHT COMPANY IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

Florida Power & Light Company ("the Company") was incorporated under the laws of Florida in 1925 and is, and has been since that time, engaged in the electric utility business. It operates in 35 counties in the State of Florida, serving an area of about 27,650 square miles with an estimated population of 5,000,000. The Company as of June 30, 1981 served approximately 2,266,000 customers with electricity. FPL is the fifth largest investor owned utility in the United States.

Regulation of public utilities has been declared by the Florida Legislature to be in the public interest and an exercise of the police power of the State for protection of the public welfare.[1] As an exercise of this power, the Legislature created the Public Service Commission which body regulates the Company with respect to its rates and services.[2]

The Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 et seq. ("PURPA")[3] directly impacts upon the system established by the State for the welfare of its citizens and affects the decision making process of the Company as well as its rate structure.

Florida Power & Light Company has a strong interest as a concerned citizen of the State of Florida in the issues involved in this case. It will explore the recent trend in Congressional legislation of using the States to enforce federal policies and will show that PURPA is the proverbial "straw" that breaks the back of Federalism as it has been known in this country for more than 200 years.

Consent has been given by all parties to the filing of this brief.

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[1]Fla. Stat. §366.01 (1979).

[2]Fla. Stat. §366.04 (Supp. 1980).

[3]Reference to PURPA in this brief includes only Title I, (codified at 16 U.S.C. §§2601-2645 (Supp. III 1979)); Title II, Section 210, (codified at 16 U.S.C. §824a-3 (Supp. III 1979)); and Title III, (codified at 15 U.S.C. §§3201-3211 (Supp. III 1979)) (hereinafter cited by Code section only).

STATEMENT

This challenge to PURPA presents one of the most "delicate issues of federal–state relationships"[4] this Court has faced: may the Federal government, pursuant to its Commerce Power, compel an unwilling State government to participate in or implement a federal regulatory program?[5]

The subtle and highly complex relationship that exists between State and Federal authority in the federalistic structure established by the Constitution[6] has been termed "Our Federalism" by judges and scholars alike.[7] The principles of Federalism have served as a restraint on Federal power in multiple spheres.

Federalism precludes Federal courts from enjoining pending State proceedings unless extraordinary

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[4] *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 (1974).

[5] The Court should note that PURPA is founded solely upon Congress's Commerce Power. There is no issue here of whether Congress could take the actions challenged under any of its other delegated powers such as the Spending Power, the War Power or its power under the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

[6] *See* Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954).

[7] "It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future." *Younger v. Harris*, 401 U.S. 37, 44-45 (1971) (Black, J.). *See also* Friendly, *Federalism: A Foreword*, 86 Yale L.J. 1019 (1977).

circumstances exist.[8] Not to abstain would weaken the institutional autonomy of State governments.[9] Two other forms of abstention allow the States to determine unsettled questions of their own law,[10] and to promote coherent policies in areas of particularly important public interest to the States.[11] All of these decisions are aimed at eliminating unnecessary friction between the State and Federal systems.

Intergovernmental comity is also promoted when the principles of Federalism are invoked to prevent imposition of Federal standards on State judicial institutions,[12] and administrative agencies.[13] Even when valuable constitutional rights are implicated, if the States provide an adequate opportunity for full and fair litigation of the constitutional claim, Federal courts will not interfere.[14]

The Supreme Court in exercising its appellate jurisdiction over State court cases will decline to review

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[8] *See Younger* v. *Harris*, 401 U.S. 37 (1971). The *Younger* principles now apply to civil as well as criminal proceedings. *See e.g., Moore* v. *Sims*, 442 U.S. 415 (1979) (temporary removal of child in child abuse context).

[9] *See* Tribe, American Constitutional Law 152 (1978).

[10] *Pullman* abstention, derived from the landmark case of *Railroad Commission of Texas* v. *Pullman*, 312 U.S. 496 (1941).

[11] *See Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

[12] *See O'Shea* v. *Littleton*, 414 U.S. 488 (1974).

[13] *Rizzo* v. *Goode*, 423 U.S. 362 (1976) (police department).

[14] *Stone* v. *Powell*, 428 U.S. 465 (1976) (habeas corpus).

Federal questions, constitutional or otherwise, if the decision rests on independent and adequate State grounds.[15] The certification process in Federal courts of State law questions also "helps build a cooperative judicial federalism."[16]

If States are to have a viable existence, Congress, as well as the courts, must be prevented from acting in ways that leave their form intact but remove all functional substance.[17] Congress should not forget that Federalism is the relation of independent, equal bodies politic that operates by the obligation of good faith, rather than coercive authority.[18]

Regardless of whether it's a question of balancing interests,[19] or a question of absolute immunity,[20] this

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[15]*See e.g. Henry* v. *Mississippi*, 379 U.S. 493 (1965); *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935); *Murdock* v. *Memphis*, 87 U.S. (20 Wall.) 590 (1875).

[16]*Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974); *Shevin* v. *Exxon Corp.*, 526 F.2d 266, 274 (5th Cir. 1976).

[17]Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 Harv. L. Rev. 1065, 1071 (1977).

[18]Diamond, *Commentaries on the Federalist*, 86 Yale L.J. 1273, 1279-80 (1977).

[19]*See United Transp. Union* v. *Long Island R.R.*, 634 F.2d 19, 24 (2d Cir. 1980), and cases cited therein.

[20]*See* Matsumoto, *National League of Cities—From Footnote to Holding State Immunity from Commerce Clause Regulation*, 1977 Ariz. St. L.J. 35, 71 n. 193; Tushnet, *Constitutional and Statutory Analyses in the Law of Federal Jurisdiction*, 25 U.C.L.A. L. Rev. 1301, 1338, 1340 (1978).

Court has long recognized that Congress cannot take from the States those powers which are "essentially and peculiarly state powers."[21] Our Constitutional Federalism has barred the imposition of even a non-discriminatory tax upon the States.[22] And Congress cannot tell a State where to locate its capital.[23]

With the growing complexity of life in this country, national power has expanded,[24] and Congress has utilized the commerce power to enact "a whole rash of statutes" regulating every phase of life[25] historically within the State sphere—from promotion of safety to protection of borrowers and consumers and protection of the environment.[26]

A thorough though not exhaustive review of United States statutes during the early constitutional, civil war, and even new deal eras reveals no statutes which prescribed Federal standards or purposes for consideration, adoption, or mandatory implementation by State governments or their agencies. In recent years, Congress has initiated an approach to legislation which

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[21] *Coyle v. Oklahoma*, 221 U.S. 559, 564 (1911).

[22] *New York v. United States*, 326 U.S. 572 (1946).

[23] *Coyle v. Oklahoma*, *supra*.

[24] Friendly, *supra* n. 7, at 1023-30.

[25] *Id.* at 1025.

[26] *Id.* (Footnotes omitted.)

attempts to use the States to implement and to enforce Federal standards or policies.[27]

THE STATUTE

Title I and Title III of PURPA

Titles I and III of PURPA impose substantive and procedural burdens on the States.[28] Congress dictates not only the matters to be decided upon by the States,[29] but also the manner and time in which these decisions must be made. The titles impose a decision making process upon the States for establishing rates for electric utilities and for determining the terms and conditions to govern electric and natural gas service.

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[27] *See e.g., Surface Mining Control and Reclamation Act of 1977*, 30 U.S.C. §1201 *et seq.* (Supp. III 1979); *Education for Handicapped Children Act*, 20 U.S.C. §1401 *et seq.* (1976); *Clean Air Act*, 42 U.S.C. §7401 *et seq.* (1975) (replacing 42 U.S.C. §1857 *et seq.* (1973)).

[28] The provisions of PURPA which were invalidated by the United States District Court for the Southern District of Mississippi, J 79-0212 (C), include those which regulate certain utilities within the States not otherwise regulated by State commissions. This brief addresses only those provisions which mandate State action.

[29] Public Service Commissions are uniquely State entities created by State legislatures to enforce and implement State law within their jurisdictions. Action by such a regulatory authority is action by the State.

The Procedure: The State is forced, by a stated time,[30] after public notice, to conduct a public hearing,[31] admit certain intervenors[32] and "consider" ratemaking standards established by Congress in PURPA.[33] Congress mandates that the State must issue a "determination" concerning the appropriateness of implementing these standards. That determination must: (1) be made in writing, (2) include findings, and (3) be based upon evidence heard.[34] If the State declines to implement a standard it finds appropriate, it must publicize its reasons.[35]

A second group of Federal standards which a State must address concerns the terms and conditions of electric and natural gas service which may indirectly

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[30]16 U.S.C. §2622(b), (c). S. Conf. Rep. No. 95-1292, 95th. Cong., 2d Sess. 74 (1978) states: "[T]he purpose of the time limits in this section [is] to ensure expeditious consideration once *with the obligations being on the state regulatory authority*, or non-regulated utility, without any other action by any person to initiate such consideration." (Emphasis added).

[31]16 U.S.C. §2621(b)(1).

[32]16 U.S.C. §2631, 2622.

[33]Section 111(d) of PURPA, codified at 16 U.S.C. §2621(d), establishes six Federal standards to be considered in determining the rate structure of a particular utility. These standards are: (1) cost of service, (2) declining block rates, (3) time-of-day rates, (4) seasonal rates, (5) interruptible rates, and (6) load management techniques.

[34]16 U.S.C. §2621(b)(1).

[35]16 U.S.C. §2621(c)(2).

affect the rate structure of the utility.[36] Congress, and not the States, determines under what conditions the State must adopt the standards. As with the rate-making standards, each State must after public notice, conduct a hearing respecting these standards, but in this case, the State must adopt the standards or state in writing and publicize its determination and reasons for not adopting such standards.[37]

The Substance: PURPA mandates the outcome of the State's evaluation of the standards it considers. For example, cost of service must be determined by PURPA's rules.[38] PURPA also dictates that the State must prescribe Federal procedures for termination of service if they comport with State law.[39] Congress effectively determines what the State must enact through legislation or regulation.

The State is never given the choice of nonparticipation or inaction. In order to maintain the status quo it must act in a prescribed way and explain

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[36]The standards established for electric utility regulation are (1) mastermetering, (2) automatic adjustment clauses (3) information to consumers (4) procedures for termination of electric service (5) advertising. 16 U.S.C. §2623(b). Those standards established for natural gas utilities are (1) procedures for termination of natural gas service and (2) advertising. 15 U.S.C. §3203(b).

[37]16 U.S.C. §2621(a), (c). Under 16 U.S.C. §2626 and 15 U.S.C. §3209, the States must report to the Federal government concerning their progress.

[38]16 U.S.C. §2625(a). *See also* §2625(b)-(h) directing State decisions defining standards.

[39]16 U.S.C. §§2623(b)(4), 2625(g); 15 U.S.C. §3204(a).

its actions in writing.[40] The Act creates a Federal agenda for the State, establishes its priorities and creates standing for individual and Government intervenors in its courts and administrative proceedings.[41]

Intervention rights are protected by enforcement provisions under Titles I and III.[42] "Any person" is granted standing in State court to bring an action to enforce the requirements of these titles,[43] and an electric utility or consumer may bring an action in the appropriate United States District Court to secure the intervention right if it is denied in State court.[44] In addition, the Secretary of Energy may bring an action directly in Federal court to enforce his right to intervene.[45] The Federal court in both cases is given jurisdiction to grant appropriate relief.

State courts are required to review for persons who have intervened or otherwise participated in the original proceeding, any determination made by the State authority with respect to any electric utility.[46]

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[40]Under §2621(c)(2), if a State declines to implement an appropriate standard, it must file a statement of its reasons which shall be available to the public.

[41]16 U.S.C. §§2622, 2631.

[42]*See* 16 U.S.C. §2633; 15 U.S.C. §3207.

[43]No such action may be brought in a State court with respect to a utility which is a Federal agency. 16 U.S.C. §2633(c)(1); 15 U.S.C. §3207(b)(1).

[44]16 U.S.C. §2633(b)(2).

[45]16 U.S.C. §2633(b)(1).

[46]16 U.S.C. §2633(c)(1).

The review and enforcement provisions allow not only Congress to intrude upon the functioning of the State administrative body and its courts, but also allow a Federal court to interject its rulings into the activities of the State, contrary to the principles of Federalism.[47]

Title II, Section 210 of PURPA

Section 210 of Title II,[48] concerns cogeneration and small power production. Instead of a guideline approach, which had been adopted by the Senate,[49] the final bill requires that States implement, within one year, rules which FERC prescribes as necessary to encourage cogeneration and small power production.[50]

FERC is authorized to enforce the requirements of this subsection by an action against the State or by enforcement as a rule under the Federal Power Act.[51] Enforcement may be initiated by FERC, by a qualifying cogenerator or small power producer.[52] If FERC does not act within 60 days of a request for enforcement, the petitioner may bring an action in Federal court and subject a State authority to injunctive action or other relief.[53]

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[47]See notes 4-27, *supra*, and accompanying text.

[48]16 U.S.C. §824a-3.

[49]See Reports cited in Government's Brief at 32.

[50]16 U.S.C. §824a-3(f). As used herein, FERC means the Federal Energy Regulatory Commission.

[51]16 U.S.C. §824a-3(h)(2)(A).

[52]16 U.S.C. §824a-3(h)(2)(B).

[53]*Id.*

SUMMARY OF ARGUMENT

Federal legislation is invalid unless founded upon one of the powers delegated to Congress in the Constitution. PURPA, allegedly based upon Congress's power over interstate commerce, does not regulate commerce of any type. PURPA regulates the power of the States to govern commerce, and consequently, not being supported by a delegated power, is unconstitutional.

PURPA is also invalid because it violates the constitutional limitations imposed by the Tenth Amendment and the doctrine of Constitutional Federalism. PURPA regulates the States as States by compelling them to implement and enforce Federal regulations, to consider Federal standards, to hold public hearings and to report annually to the Federal Government. It displaces *the* attribute of sovereignty—the States' power to govern. And it impairs the States' ability to structure their integral operations in areas of traditional functions. The most traditional State function of all is governing. By telling the States when, how and what to govern, PURPA doesn't just impair, it eviscerates the States' ability to structure their governments, and thus, cannot stand.

ARGUMENT

I. THE POWER OF THE STATES TO GOVERN COMMERCE IS NOT "COMMERCE" SUBJECT TO CONGRESSIONAL REGULATION UNDER THE COMMERCE CLAUSE.

Though Congress is "supreme within its sphere of action,"[54] its acts are valid only when supported by one of the delegated powers granted to the Federal government in our Constitution.[55] This Court has repeatedly reminded Congress that the Constitution's grant of power to the Federal government was carefully tailored and means what it says. Mr. Chief Justice Hughes said of the power:

> The subject of the Federal power is still "commerce" and not all commerce but commerce with foreign nations and among the several states. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains.[56]

Accordingly, as this Court pointed out in *Gibbons v. Ogden*, "our constitution being . . . one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word."[57]

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[54] *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

[55] *Id.; Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

[56] *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 466 (1938).

[57] 22 U.S. at 189-90.

Examining the commerce power, this Court explained in *Gibbons:*

> The subject to be regulated is commerce. . . . Commerce, undoubtedly is traffic, but it is something more; it is intercourse. It describes the *commercial* intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.[58]

In recent years, the Court has delineated the scope of Congressional power over interstate commerce. In cases such as *Wickard v. Filburn*,[59] *Perez v. United States*,[60] and *Katzenbach v. McClung*,[61] this Court has held that Congress has power to reach commercial activities which, while wholly intrastate, substantially affect interstate commerce. But in each such instance, Congress is regulating "commerce," local though it may be. In *Wickard*, it was held constitutionally permissible for Congress to regulate an individual farmer's production of wheat. In *Perez*, it was Congress's "Consumer Credit Protection Act" which was upheld, regulating extortionate credit transactions. In *McClung*, the commerce power permitted Congress to regulate a restaurant, small in size and local in nature, but a commercial enterprise nevertheless.

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[58] *Id.* (emphasis added).

[59] 317 U.S. 111 (1942).

[60] 402 U.S. 146 (1971).

[61] 379 U.S. 294 (1964).

It is, then, commercial activities, nationwide or local, over which Congress has power. Herein lies the rub. In PURPA, Congress flexes power not over commerce but over States, not over commercial activity but over the acts of governments. In this case, Congress's far-reaching power reaches too far.[62]

In *National League of Cities*,[63] the Court was concerned with an attempt by Congress to regulate certain commercial activities of the States, namely, the minimum wages, overtime hours and pay for State employees. The question presented in that case was whether the given constitutional authority of Congress over "interstate commerce" justified the congressional law. The Court ruled that the commercial activities of the States were so "integral" to State government that the congressional laws were tantamount to regulation of the "states qua states," and thus forbidden by the Tenth Amendment. The dissenting justices felt that the "interstate commerce" power of Congress embraced these economic activities of the States, as it did the same economic activities of private employers. But as stated by Justice Brennan in his dissenting opinion: "Of course, regulations that this Court can say are not regulations of 'commerce' cannot stand . . . ." We think the majority opinion of the Court implicitly acknowledges this statement; and therein lies a fundamental distinction between this case and *National League of Cities*.

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[62]The Court should note that PURPA is founded solely upon Congress's Commerce Power. There is no issue here of whether Congress could take the actions challenged under any of its other delegated powers.

[63]*National League of Cities v. Usery*, 426 U.S. 833 (1976).

In PURPA, there is no commercial activity of the States which Congress seeks to regulate. Rather, it seeks, in certain ways, to direct and fashion the very process by which the States govern the commercial activities of others. Congress is trying to regulate the governmental process of the States by requiring certain things to be done by the various State public service commissions, commissions created by State legislatures and empowered by them to regulate those within their jurisdictions.

Since there is no commercial activity of the States which Congress seeks to sway, Congress cannot look to its power over "interstate commerce" to support this particular legislation. Absent some State economic activity, we submit that Congress has no constitutional basis from which to arguably justify the law. Absent a constitutional basis of authority, the legislation runs smack into the dictates of the Tenth Amendment, and it cannot stand.

In its brief, the Government acknowledges that, as it euphemistically puts it, PURPA places "certain regulatory responsibilities upon the states":

> To be sure, the statute in suit places certain regulatory responsibilities upon the states. Some of the provisions at issue do more than "allow" state regulation. Portions of Titles I and III *require* state regulatory authorities to "consider" whether or not to adopt and implement certain regulatory standards; the state commissions *must adhere* to certain procedural requirements in considering these standards, *must permit* the Secretary of Energy to participate in the

> proceedings, and *must report* to the Secretary their progress in the consideration process. Section 210(f)(1) *requires* the state authorities to implement the Federal Energy Regulatory Commission's rules concerning transactions between cogenerators and electric utilities; the Commission is empowered under Section 210(h)(2) to enforce this statutory responsibility in Federal court.[64]

The entire State governmental process, and with it, the States' power to govern, is regulated.

That a State's power to govern is not commerce is self-evident. Governing is not a commercial activity—it is *the* attribute of sovereignty. A sovereign, by definition, governs. Governing is uniquely capable of being done only by a State. It is one of those activities which "partake[s] of uniqueness from the point of view of intergovernmental relations."[65]

This factor, above all, distinguishes this case from all others faced by this Court. In *Brown* u *Environmental Protection Agency*,[66] the United States Court of Appeals for the Ninth Circuit concluded that it is one thing for

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[64]Government's Brief at 28-29 (emphasis added).

[65]*New York* u *United States*, 326 U.S. 572, 582 (1946) (Frankfurter, J.).

[66]521 F.2d 827 (9th Cir. 1975), *vacated and remanded for consideration of mootness*, 431 U.S. 166 (1977).

Congress to regulate commerce and quite another for it to regulate the State's power to regulate commerce:

> Neither [*Fry* nor *Wirtz*] holds or even suggests that a state's exercise of its police power with respect to an economic activity which affects interstate commerce is itself an economic activity or "species of commercial intercourse" subject to regulation by Congress.
>
> . . .
>
> The *power of states over commerce* has no more been recognized as commerce than has the *power of Congress which is derived from the Commerce Clause.*[47]

As Justice Brennan has declared, "regulations that this Court can say are not regulations of 'commerce' cannot stand . . . ."[48] PURPA is not a regulation of commerce and thus cannot stand.

II. PURPA VIOLATES THE 10TH AMENDMENT AND CONSTITUTIONAL FEDERALISM.

Were the Court to employ the rationale of the *National League of Cities/Virginia Mining* cases, this Federal law cannot stand. PURPA violates the Tenth Amendment and the fundamental structure of our Federal form of government, the integral "concept of constitutional

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[47] *Id.* at 838-39 (emphasis in original). *Wirtz*, inserted in quote refers to *Maryland v. Wirtz*, 392 U.S. 193 (1968), *overruled in National League of Cities.*

[48] *National League of Cities, supra* at 860 (citations omitted).

federalism."[69] Under that principle, the States and the Federal government are equals, joined together in "an indestructible Union, composed of indestructible States."[70]

Recently this Court announced a three-prong test for determining issues arising under the *National League of Cities* doctrine. In *Virginia Mining*, this Court declared:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." . . . Second, the Federal regulation must address matters that are indisputably "attributes of state sovereignty." . . . And third, it must be apparent that the States' compliance with the Federal law would directly impair their ability "to structure integral operations in areas of traditional functions."[71]

When examined in light of these three principles, PURPA fails.

A. PURPA Regulates the States as States.

As discussed extensively in Part I of this Brief, there can be no question that PURPA regulates the

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[69] *Fry v. United States*, 421 U.S. 542, 554 (1975)(Rehnquist, J., dissenting).

[70] *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869).

[71] *Virginia Mining*, *supra*, at 4660.

"States as States."[72] Congress did not address only the activities of private individuals and businesses. Its demands are directed to "each State regulatory authority." The States through their agencies must participate in the Federal program in derogation of their until-now independent will and discretion.

B. PURPA Addresses Matters That Are Indisputably "Attributes of State Sovereignty."

The Government contends that "[t]he regulation of intrastate activities of electric and gas utilities is not an essential attribute of state sovereignty,"[73] and goes on to discuss concurrent jurisdiction over utilities.[74] The Government's emphasis on the object of regulation is misplaced. The "essential attribute of state sovereignty" at issue in this case is regulation itself. Regulation is nothing more and nothing less than governance by a state through its regulatory authorities.

Governing is *the* attribute of State sovereignty which attaches to every State government. As Justice Brennan declared in his dissent in *National League of Cities*, "[c]ertainly the paradigm of sovereign action—action qua state—is in the enactment and enforcement

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[72]Some pro-Government *amici* candidly concede this point. *See, e.g.*, Briefs of: County of Onandaga, New York at 8; National Alliance for Hydroelectric Energy, *et al.* at 23, 24. Although the Government does not address it directly, it does admit that PURPA "places certain regulatory responsibilities upon the States." Government's Brief at 28.

[73]Government's Brief at 30.

[74]*Id.* at 30-31.

of state laws."[75] PURPA clearly addresses attributes of State sovereignty. Titles I and III of PURPA interfere with the discretion inherent in the enactment and enforcement of state laws. The States are told when, what and how they are to regulate. They are not given a choice of non-participation in the Federal program. Section 210 mandates implementation and enforcement of rules on cogeneration. Implementation necessitates enactment and enforcement.

This is not "cooperative federalism" which allows States "to enact and administer their own regulatory programs, structured to meet their own particular needs."[76] If substantive and procedural decision making is dictated to the States, nothing remains of their sovereignty. The power to consider, enact and implement, or not consider, not enact or not implement, in its discretion, whatever constitutional laws and rules it chooses, is a sacrosanct and essential attribute of sovereignty possessed by every State. A sovereign without that power is not a sovereign.

C. PURPA Directly Impairs the States' Ability to Structure Integral Operations in Areas of Traditional Functions.

The Government claims that PURPA does not directly impair the States' ability to structure their integral operations because nothing in PURPA "requires the states to establish a public service commission or

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[75] 426 U.S. at 875.

[76] *Virgina Mining, supra,* at 4660.

to extend state jurisdiction to utilities that are not subject to state regulation [, but rather] PURPA merely obligates the states to perform certain regulatory functions with respect to the utilities they are already regulating."[77] Further, the Government claims that nothing in PURPA "displace[s] the states' basic authority to design a public utility rate structure that is responsive to state needs."[78]

Again, this is not the issue. The most "traditional" of all of a State's functions is governing. Nothing could more directly displace a State's ability to structure its integral operations of governing than a Federal law commandeering the State's governing process itself. This is the critical distinction between this case and *Virginia Mining.*

This Court faced but did not reach this issue once before. In *EPA v. Brown,*[79] this Court reviewed a series of cases arising under the Clean Air Act under which the States were obligated to enact certain Federal regulations as State laws. All the lower courts noted that "serious constitutional questions might be raised" if the statute were read to authorize the Administrator to require States to submit legally adopted regulations.[80]

The Government attempts to distinguish this line of cases by urging that PURPA does not require the

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[77]Government's Brief at 35.

[78]*Id.* at 36.

[79]431 U.S. 99 (1977).

[80]*Id.* at 101-102.

States "to enact legislation, promulgate regulations, or expend state funds."[21] Yet, the record shows that to comply with PURPA a State must "expend state funds."[22] And, the statute itself requires that "[after] any rule is prescribed by the Commission . . . , each State regulatory authority shall . . . implement such rule . . . ."[23] If the Government is claiming that "implementing" rules is different from "promulgating" or "enacting" rules, it makes a distinction without substance. No matter what label is used, the point is the same: the State governing process is being commandeered to enforce a Federal program.

If Congress cannot regulate hours and wages of State employees because it would "directly impair the States' ability to structure integral operations in areas of traditional functions," surely Congress cannot tell State Public Service Commissions how to discharge their legislative duties and authority.

The Government attempts to justify its displacement of the States' governmental processes by claiming that "Congress could constitutionally have achieved the same results it sought to reach in PURPA by enacting legislation that completely preempted the states in this area. . . . It is difficult to appreciate why the statute should be more vulnerable because Congress chose a less radical

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[21]Government's Brief at 41.

[22]Joint Appendix, p. 60, affidavit of Keith Howle, Director of Utilities, Mississippi Public Service Commission. The cost to Mississippi alone exceeds two million dollars during the coming years. *Id.*

[23]16 U.S.C. §824a-3(f)(1).

course out of concern that preemptive Federal regulation would constitute undue interference with the traditional authority of state regulatory commissions over retail utility ratemaking."[84] But there is a constitutional basis for Congress to take over the regulation of utilities should it so choose, *i.e.*, the interstate commerce power. Choosing not to exercise a given power does not create a constitutional power which does not otherwise exist.

As former United States Attorney General Edward Levi told Congress, "[i]t is an insidious point to say that there is more federalism by compelling a State instrumentality to work for the Federal Government. . . . That is a very enticing argument, it makes it easier for the Federal Government to encroach, it makes it easier to wipe out the sovereignty of the separate states."[85]

By commandeering the States' governing processes to implement and enforce an otherwise unpopular Federal law, Congress could thwart the political process, since the blame and political pressure will fall upon the State officials forced by Congress to the forefront of the controversy. It is this characteristic which so distinguishes this case from any which present questions of preemption. When Congress preempts a field of law, the political benefits and costs fall upon Washington. The political process is focused on Congress where it belongs. Those

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[84]Government's Brief at 31-32.

[85]Hearings on S.354 [The Federal No-Fault Automobile Insurance Act] Before the Senate Committee on Commerce, 94th Cong., 1st Sess., Ser. 94-20, 496 at 503 cited in Salmon, *The Federalist Principle: The Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act.* 2 Colum. J. Envt'l L. 290, 341 n. 83.

who argue for a new Federal scheme, exemplified by PURPA, would divert the process and diffuse its impact by compelling unwilling State authorities to implement the Federal will and then shoulder any possible blame.

D. The National Interest in Energy Conservation Does Not Justify PURPA's Intrusion on State Sovereignty.

In *National League of Cities*, this Court reserved a very narrow exception based on *Fry v. United States*[56] for upholding certain Congressional legislation that would otherwise meet what is now the three-prong test of *Virginia Mining*.[57]

In *Fry*, the issue presented to this Court was whether stemming rampant inflation warranted a very brief, cost-saving and minimal intrusion upon the attributes of State sovereignty. Without the legislation, the salaries of the vast number of State employees nationwide could not have been reached, and would have increased, thwarting Congressional aims.

This case does not present a choice between State sovereignty and imperative Federal regulation. Congress has multiple alternatives for implementing its energy standards and policies without infringing at all on the independence of the States. It need not forego important national decisions if PURPA is invalidated, and, therefore, this "emergency doctrine" does not apply.

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[56] 421 U.S. 542 (1975).

[57] This exception was reiterated in *Virginia Mining*, *supra*, at 4660 n. 29.

If it does, its strict requirements are not fulfilled. In *National League of Cities*, the Court found that ESA "was occasioned by an extremely serious problem which endangered the well-being of all component parts of our Federal system and which only collective action by the National Government might forestall."[28]

There was an energy problem in this country. But, no such problem existed with regard to State regulation of utilities. The Senate Committee on Energy and Natural Resources noted that the States were making considerable progress in the area of ratemaking reform, stating:

> [I]t is probable that ratemaking reform will progress *without new Federal policies* and it is certain that the experience gained with innovative methods will provide a better basis for the formulation of Federal policy than is presently available.[29]

Congress decided that preemption was not necessary,[30] and left ultimate responsibility and costs of utility regulation upon the States. Any claim that "only collective action by the National Government" could forestall energy problems is specious.

The second distinction of *Fry* found that ESA was "carefully drafted so as not to interfere with the States'

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[28]426 U.S. at 853. ESA is the Economic Stabilization Act of 1970, upheld in *Fry*.

[29]S. Rep. 95-442, 95th Cong. 1st Sess. 13 (1977) (emphasis added).

[30]S. Reps. Nos. 95-442, 95-1292, *supra*.

freedom beyond a very limited, specific period of time."[91] PURPA requires at least 10 years of reporting and unlimited implementation of FERC's rules. Moreover, as stated above, PURPA could have been carefully drafted to fulfill Federal energy policies without interfering with the States' freedom at all. It could have preempted utility regulation, or given the States a choice of regulating or ceding the area to Federal authority.

Third, ESA "displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves."[92]

The very fiber of PURPA is to displace the State policy choices for consideration and action. State regulatory authorities have been stripped of the discretion to determine policy and priorities within their jurisdictions, the procedure for their proceedings and the timing for their agendas.

Finally, ESA "operated to reduce the pressures upon State budgets rather than increase them."[93] PURPA has the opposite effect.

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[91] 426 U.S. at 853. In fact, the time had passed before the Court reviewed the Act. See Justice Douglas's dissent in *Fry*.

[92] 426 U.S. at 853.

[93] *Id.*

CONCLUSION

Preferring not to undertake the direct responsibility of governing the utility businesses, Congress cannot govern them by governing the sovereign States. Under the Constitution, State governments cannot be required to be conduits for the national government. This Court must affirm the District Court's decision.

Respectfully submitted,

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